IN THE SUPREME COURT OF IOWA

Supreme Court No. 16-0076
United States District Court for the Northern District of Iowa
No. 5:15-cv-04020

BOARD OF WATER WORKS TRUSTEES OF THE CITY OF DES MOINES, IOWA,
Plaintiff-Appellant

vs.

SAC COUNTY BOARD OF SUPERVISORS AS TRUSTEES OF DRAINAGE DISTRICTS 32, 42, 65, 79, 81, 83, 86, and CALHOUN COUNTY BOARD OF SUPERVISORS and SAC COUNTY BOARD OF SUPERVISORS AS JOINT TRUSTEES OF DRAINAGE DISTRICTS 2 AND 51 and BUENA VISTA COUNTY BOARD OF SUPERVISORS and SAC COUNTY BOARD OF SUPERVISORS AS JOINT TRUSTEES OF DRAINAGE DISTRICTS 19 and 26 and DRAINAGE DISTRICTS 64 and 105.
Defendants-Appellees

CERTIFIED FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF IOWA REASSIGNED FROM HONORABLE MARK W. BENNETT TO HONORABLE LEONARD T. STRAND, DISTRICT COURT JUDGE, PRESIDING, ON FEB. 17, 2016

FINAL REPLY BRIEF OF APPELLANT BOARD OF WATER WORKS TRUSTEES OF THE CITY OF DES MOINES, IOWA

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Iowa Cases:

Bd. of Sup'rs of Worth Cnty. v. Dist. Court of Scott Cnty., 229 N.W. 711, 712 (Iowa 1930)

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Other Cases:

American Farm Bureau Federation v. United States E.P.A., 792 F.3d 281, 309 (3d Cir. 2015) cert. denied, --- U.S. ---, --- S. Ct. ---, --- L. Ed. 2d ---, 2016 WL 763272 (2016)

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Iowa Cases:

Chicago Cent. & Pacific R. Co. v. Calhoun Cnty. Bd. of Sup'rs, 816 N.W.2d 367, 374 (Iowa 2012)

Fisher v. Dallas County, 369 N.W.2d 426 (Iowa 1985)

Reed v. Muscatine-Louisa Drainage Dist. No. 13, 263 N.W.2d 548, 550 (Iowa 1978)

3. As a matter of Iowa law, can the plaintiff assert protections afforded by the Iowa Constitution's Inalienable Rights, Due Process, Equal Protection, and Takings Clauses against drainage districts as alleged in the Complaint?

Iowa Cases:

Bormann v. Bd. of Sup'rs in and for Kossuth Cty., 584 N.W.2d 309, 319-20 (Iowa 1998)

Charles Hewitt & Sons Co. v. Keller, 275 N.W. 94 (Iowa 1937)

Dalarna Farms v. Access Energy Coop., 792 N.W.2d 656, 663-64 (Iowa 2010)

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Gacke v. Pork Xtra, LLC, 684 N.W.2d 168 (Iowa 2004)

Gard v. Little Sioux Intercounty Drainage Dist. of Monona and Harrison Counties, 521 N.W.2d 696, 699 (Iowa 1994)

Iowa Coal Mining Co. v. Monroe Cnty., 494 N.W.2d 664, 667 (Iowa 1993)

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State v. Short, 851 N.W.2d 474, 513 (Iowa 2014)

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Varnum v. Brien, 763 N.W.2d 862, 880 (Iowa 2009)

Other Cases:

Alperin v. Vatican Bank, 410 F.3d 532, 548 (9th Cir. 2005)

Arkansas Game & Fish Comm'n v. United States, --- U.S. ---, 133 S. Ct. 511, 518, 184 L. Ed. 2d 417 (2012)

City of Hugo v. Nichols, 656 F.3d 1251, 1267 (5th Cir. 2011)

City of Trenton v. State of New Jersey, 262 U.S. 182, 43 S. Ct. 534, 67 L. Ed. 937 (1923)

Hunter v. City of Pittsburgh, 207 U.S. 161, 28 S. Ct. 40, 52 L. Ed. 151 (1907)

Pumpelly v. Green Bay Co., 80 U.S. 166, 20 L. Ed. 557 (1872)

U.S. v. 50 Acres of Land, 469 U.S. 24, 31, 105 S. Ct. 451, 455-56, 83 L. Ed. 2d 376 (1984)

Statutes:

Iowa Code § 455B.171(39) (2015)

Iowa Code § 468.26 (2015)

Iowa Code § 468.83-.96 (2015)

Iowa Const. Art. I, § 18

Other Sources:

Kathleen S. Morris, The Case for Local Constitutional Enforcement, 47 Harv. C.R.-C.L. L. Rev. 1 (2012)

4. As a matter of Iowa law, does the plaintiff have a property interest that may be the subject of a claim under the Iowa Constitution's Takings Clause as alleged in the Complaint?

Iowa Cases:

Freeman v. Grain Processing Corp., 848 N.W.2d 58, 89 (Iowa 2014)

Peck v. Alfred Olsen Const. Co., 245 N.W. 131, 134 (Iowa 1932)

Other Cases:

Ancarrow v. City of Richmond, 600 F.2d 443, 446 (4th Cir. 1979)

Borough of Ford City v. United States, 345 F.2d 645, 647 (3d Cir. 1965)

In re Tennessee Valley Auth. Ash Spill Litigation, 805 F. Supp. 2d 468, 493 (E.D. Tenn. 2011)

St. Bernard Parish Gov. v. United States, 121 Fed. Cl. 687, 746 (2015)

United States v. 30.54 Acres of Land, 90 F.3d 790, 795 (3d Cir. 1996)

United States v. Cherokee Nation of Oklahoma, 480 U.S. 700, 705, 107 S. Ct. 1487, 1490, 94 L. Ed. 2d 704 (1987)

Statutes:

Iowa Code § 455B.171(39) (2015)

ARGUMENT

The Certified Questions address whether Drainage Districts are accountable for discharge of nitrate pollution to the Raccoon River. Drainage Districts claim their identity shields them from any responsibility for their pollution. Drainage Districts claim *stare decisis* precludes critical consideration of their immunity as applied to this case, particularly because it comes to the Court on certified questions. However s*tare decisis* is no barrier because this is a case of first impression on unique facts never before considered. Although drainage district immunity is an ancient doctrine, no case has examined that doctrine as applied to pollution or public health claims, and no case has considered the cumulative effects of home rule and other changes since the immunity's genesis.

There are good reasons not to extend immunity to this case. Refusal to consider the Certified Questions will not only leave the immunity doctrine unexamined, but will extend it to new facts.

I. THE COURT CAN RESPOND TO THE CERTIFIED QUESTIONS ON THE RECORD PROVIDED

A. The Factual Record Is Sufficient

The District Court's certification order complies with Iowa Code § 684A.3 because it sets forth detailed facts and the procedural context of the case by citing the Complaint, Amended Answer, and motion papers giving

rise to the Certified Questions. (App. 297-301). Thus, it fully shows the "facts relevant to the questions certified" as well as "the nature of the controversy." Iowa Code § 684A.3 (2015).

The Certified Questions ask whether DMWW has stated claims upon which relief may be granted. (App. 296). Even if, as Drainage Districts assert, only two facts are germane to these questions, (Br. at 4-5),[1] § 684A.3's requirements are met and the outcome of the Certified Questions does not depend on the ascertainment of any facts.

This case is therefore unlike Eley v. Pizza Hut of Am. Inc., 500 N.W.2d 61 (Iowa 1993) where the Court declined to answer certified questions because of an uncertain factual record. Eley's factual ambiguity deprived the Court of the ability to develop the contours of the rule under consideration. Eley, 500 N.W.2d at 63. Not so here. Here, the pleadings fully frame the Certified Questions, so they are amenable to categorical answers making them appropriate for certification.

Answering the Certified Questions is also appropriate because there is no more appropriate vehicle for addressing these legal issues. This case is similar to the posture of appeal from a ruling on motion to dismiss.

[1] Citations to Drainage Districts' amended appellee's brief are abbreviated as "Br."

(DMWW Br. at 19).[2] Drainage Districts incorrectly suggest DMWW is trying to convert this into a motion to dismiss. (Br. at 15 n.1). If this case were filed in state court, Drainage Districts would seek dismissal. If dismissal were granted, DMWW could seek review from this Court with the very same factual record. The Court's jurisprudence on motions to dismiss, by analogy, demonstrates the Court commonly decides legal questions akin to the Certified Questions based on a factual record similar to this case.

B. The Court's Answers to the Certified Questions Will Be Decisive

The Certified Questions arise from a case and controversy pending in the District Court. Answers to the Certified Questions will not be "advisory." An opinion is advisory if there is no justiciable controversy. Katz Inv. Co. v. Lynch, 47 N.W.2d 800, 805 (Iowa 1951). Early application of certification procedure raised concerns that certification did not produce a "case or controversy." That concern has been resolved. Allan D. Vestal, The Uniform Certification of Questions of Law Act, 55 Iowa L. Rev. 465, 473-74 (1969) ("Vestal"). Resolution of the Certified Questions will therefore be decisive of the state law and constitutional claims. Vestal at 473-74.

Contrary to Drainage Districts' assertions, (Br. at 20), DMWW is not

[2] Citations to DMWW's principal appellate brief are abbreviated as "DMWW Br."

forum shopping. Rather, Chapter 684A advances the judicial policy "requiring the same outcome regardless of whether the federal or state court renders the decision." Vestal at 465. DMWW's claims are appropriately before the District Court through the District Court's exercise of supplemental jurisdiction. 28 U.S.C. § 1367 (2015). The Court's answers to the Certified Questions will be decisive as to the state law issues.

C. There Is No Controlling Precedent

DMWW is not asking the Court to overrule precedent as Drainage Districts suggest. (Br. at 19, 35). Rather, DMWW asks the Court to reconcile various lines of authority regarding drainage district immunity, public health, home rule, and constitutional rights. This may have the effect of advancing the law in some respect, but Drainage Districts also seek to change the law by asking this Court to extend immunity to a case of first impression.

Section 684A.1 permits certification "where it appears to the certifying court there is no controlling precedent . . . ." The Court has previously answered certified questions where existing precedent did not resolve a case of first impression. Bituminous Cas. Corp. v. Sand Livestock Systems, Inc., 728 N.W.2d 216, 219 (Iowa 2007) ("[T]he federal court noted that we have not interpreted a pollution exclusion in an insurance policy in

this particular context . . . ."). A federal court can appropriately certify questions to the Court when both parties find support for their respective positions in case law. Id. at 220. The Court may also address issues via certified question when legal developments call existing rules into question. Hartford-Carlisle Sav. Bank v. Shivers, 566 N.W.2d 877, 879 (Iowa 1997).

The issues presented here arise in the context of precedent Drainage Districts contend stands for the decisive proposition that DMWW can *never* sue drainage districts because of their identity. The threshold question is whether this very broad claim is supported by "controlling precedent." There is ample precedent to be considered, but is it controlling in this case? Does it cover all issues? These questions cannot be answered *a priori* because even under the strictest view of *stare decisis* there must always be room to distinguish precedent. There can be no controlling precedent with respect to issues never argued to, or decided by, the Court. United States v. L. A. Tucker Truck Lines, Inc., 344 U.S. 33, 38, 73 S. Ct. 67, 69, 97 L. Ed. 54 (1952). This is one reason why Drainage Districts' repeated assertions that they are not liable "under any state of facts" are inapposite. (Br. at 13, 19 n.2, 21, 63) (quoting Fisher v. Dallas Cnty., 369 N.W.2d 426, 430 (Iowa 1985)). Such generalizations, particularly in the context of constitutional law, should be limited to "the concrete situations that gave rise to them . . . ."

Gomillion v. Lightfoot, 364 U.S. 339, 343-44, 81 S. Ct. 125, 128, 5 L. Ed. 2d 110 (1960).

Drainage Districts' reliance on federal authorities denying certification is misplaced. (Br. at 19-20). Tarr v. Manchester Ins. Co. declined to re-certify questions after the state court responded to certified questions. 544 F.2d 14, 15 (1st Cir. 1976); see also, Doe v. City of Chicago, 360 F.3d 667, 671-72 (7th Cir. 2004) (declining to certify questions at a preliminary stage). These federal cases are inapplicable because they represent each federal court's view in a particular case. The District Court in this case concluded certification is appropriate:

> In light of the novelty of DMWW's state law arguments, *the fact that this case is one of first impression*, for either this court or the Iowa Supreme Court, and the public importance of this case, I believe that the interests of the parties and the public are best served by a definitive adjudication of these state law issues by the ultimate authority on them - the Iowa Supreme Court.

(App. 318) (emphasis added).

There is no "controlling precedent" resolving whether DMWW has properly stated pollution claims based on public health concerns or in light of home rule. Similarly, this Court has never before considered a nuisance or takings claim arising from pollution against a drainage district. Further, while the Court rejected a specific equal protection challenge to drainage district immunity in Gard v. Little Sioux Intercounty Drainage Dist. of

Monona and Harrison Counties, 521 N.W.2d 696, 699 (Iowa 1994), the Court has not considered other constitutional questions presented. For example, no case has ever considered application of the inalienable rights and takings doctrines exemplified by Gacke v. Pork Xtra, LLC, 684 N.W.2d 168 (Iowa 2004) to drainage districts.

II. CERTIFIED QUESTION 1: APPLYING IMMUNITY TO THIS CASE IS UNSOUND AND UNWARRANTED

Drainage Districts rely on case law that protects them from damages liability to prevent DMWW from seeking accountability for nitrate pollution. Drainage Districts condense this argument by saying DMWW must sue a "proper party rather than an improper party."[3] (Br. at 21). However, even-handed justice suffers when special status is granted to any party. Turner v. Turner, 304 N.W.2d 786, 787 (Iowa 1981). Further, "if precedent is to have any value it must be based on a convincing rationale." State v. Ochoa, 792 N.W.2d 260, 267 (Iowa 2010) (internal citations omitted). No convincing rationale for special treatment exists in this case.

The core argument for special status here is that constitutional and statutory provisions governing drainage districts establish a system of local

[3] Drainage Districts argue they are the wrong parties to sue because they have no power over pollution. This simply begs the question of their powers. Regardless, they are the only proper parties because they have exclusive power over the infrastructure that discharges the pollution.

governmental entities with limited enumerated powers that imply and necessitate limited responsibilities. See (Br. at 22-24, 28-29). The essence of this argument is that drainage districts serve a limited function for the benefit of landowners within their boundaries, and if pollution results, that is none of their concern. There are, however, fundamental logical and practical contradictions in this position. Drainage Districts claim to be limited entities with only those powers expressly granted by statutory language, while also claiming immunity not expressed in any statute.

Iowa Code Ch. 468 grants drainage districts extensive powers to create, operate, and maintain massive infrastructure with major impacts on water quality. However, not one provision expressly creates any immunity from any claim. Iowa Code Ch. 468. Nor does any word address, much less authorize or compel, the pollution discharged by drainage districts. Id. Nevertheless, drainage districts pollute—a point Drainage Districts cannot contest. The juxtaposition of supposedly limited express powers with unlimited implied immunity is logically inconsistent.

The power to create and operate infrastructure that pollutes does not exclude the power to reduce or redress pollution. To the contrary, every power to act implies the power to act responsibly even for entities with

limited powers.[4] The power to create pollution necessarily creates a power to control such pollution or be responsible for its effects. See Vogt v. City of Grinnell, 98 N.W. 782, 783 (Iowa 1904) ("Here the remedy could be applied on defendant's own premises, and there can be no doubt of its duty to abate the nuisance.") (internal citation omitted).

The Drainage Districts assert they *must* drain, but cannot do anything to curb their pollution. (Br. at 23 n.3). Adopting the Drainage Districts' position divorces drainage from any responsibility for its systemic impacts, and endorses the notion that any steps to reduce drainage district pollution are *ultra vires*. This means there can be no restraint on their pollution, and means they must increase pollution as drainage capacity increases.[5]

It will be a tragedy if Iowa agricultural drainage, conceived more than a century ago as an instrument of progress in the name of public health, continues to renounce responsibility for pollution. This is a quintessential "tragedy of the commons" that has often led to extreme, negative results:

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[4] Drainage Districts liken themselves to governmental entities providing roads and highways. (Br. at 23 n.3). If so, they should be responsible for injurious conditions just as other governmental entities are. Stanley v. State, 197 N.W.2d 599, 604 (Iowa 1972); Jensen v. Magnolia, 257 N.W. 584, 585 (Iowa 1934).

[5] Drainage Districts clearly claim the power to expand the capacity of drainage under Iowa Code § 468.126(4). (Br. at 23 n.3).

> Our experience in state regulation of water pollution gave environmentalists poster material in the 1969 burning of the Cuyahoga River, *the consequence of a classic "tragedy of the commons," which occurs when society fails to create incentives to use a common resource responsibly*. See Garrett Hardin, The Tragedy of the Commons, 162 Science 1243, 1244 (1968).

Am. Farm Bureau Federation v. United States E.P.A., 792 F.3d 281, 309 (3d Cir. 2015) cert. denied, --- U.S. ---, --- S. Ct. ---, --- L. Ed. 2d ---, 2016 WL 763272 (2016) (emphasis added).

Drainage districts render Iowa's rivers and streams less pure than public health and welfare demand. (App. 9-14 ¶¶ 45-68). Drainage district immunity only perpetuates and expands the export of pollution to the common good's detriment. The Court should critically examine immunity before extending it to this case.

A. Legislative Inaction Does Not Require Extension of Immunity to this Case

Drainage Districts assert their immunity must be applied to every possible case, including this one, unless the legislature amends the Iowa Code. (Br. at 27-28). This overlooks immunity's judicial origins and this Court's power to revisit its own doctrines. Shook v. Crabb, 281 N.W.2d 616, 617 (Iowa 1979); Kersten Co., Inc. v. Dep't of Soc. Serv., 207 N.W.2d 117, 119 (Iowa 1973).

Drainage Districts claim immunity is based on statutory interpretation

and reflects the legislature's will, so only the legislature may revisit it. (Br. at 34). Ascertainment of legislative intent is at best difficult, but is even harder here because the immunity is not expressed in any statute. The legislature has never expressed itself on drainage district pollution. This silence leaves the question of intent open on facts never before considered.

In any case, drainage district immunity has never been based on statutory interpretation, but on an understanding of the role of political subdivisions based on the Dillon Rule, and the Home Rule Amendments to the Iowa Constitution have displaced that analysis.

B. No Drainage District Case Considered Home Rule

Drainage Districts erroneously dismiss the significance of constitutional home rule to this case. (Br. at 30-33). History demonstrates drainage district immunity solidified in an era when concepts of limited powers and existence were the polestar of political subdivision jurisprudence. Those concepts were essential to the immunity:

> A drainage district is sui generis. It is not a corporation. It cannot sue or be sued. . . . Under the statute, its affairs are managed by the board of supervisors of the county in a representative capacity. *The powers of such board, however, are limited and defined by statute*. . . .

Bd. of Sup'rs of Worth Cnty. v. Dist. Court of Scott Cnty., 229 N.W. 711, 712 (Iowa 1930) (emphasis added) (internal citations omitted). This

rationale—the Dillon Rule—was expansively applied in that era.

However, Iowa Const. Art. III, § 39A repealed the Dillon Rule for county entities, creating a fundamental problem for the Drainage Districts' rationale. Further, drainage districts can bring suits. Iowa Code § 468.90.

Drainage Districts assert home rule simply does not apply to them because they are created by state law and are not counties. (Br. at 31-32). This ignores that a "drainage district *is a political subdivision of the county in which it is located*, its purpose being to aid in the governmental functions of the county." State ex rel. Iowa Employment Sec. Comm'n v. Des Moines Cnty., 149 N.W.2d 288, 291 (Iowa 1967) (emphasis added). Further, home rule applies because the Drainage Districts were originally created, and are governed, by county boards of supervisors. See also Polk Cnty. Bd. of Sup'rs v. Polk Commonwealth Charter Comm'n, 522 N.W.2d 783, 792 (Iowa 1994) (Iowa Const. Art. III, § 39A defines county charter commission's powers).

Drainage Districts claim that entities incapable of redressing harm should not be liable, (Br. at 40-41), but they misunderstand the scope of their authority. Home rule cannot be exercised in contravention of statute. See Goodell v. Humboldt Cnty., 575 N.W.2d 486, 492-93 (Iowa 1998). However, Drainage Districts cannot point to any affirmative command in

Iowa Code Ch. 468 requiring them to pollute. Therefore, any measures taken to reduce pollution will not be "inconsistent" with state law. See id.; (DMWW Br. at 31 n.5).

Drainage Districts incorrectly cite cases applying immunity since county home rule was enacted in 1978 to argue a home rule analysis is precluded. (Br. at 32). As previously noted, cases that have not addressed an issue cannot decide an issue. L. A. Tucker Truck, 344 U.S. at 38, 73 S. Ct. at 69, 97 L. Ed. 54. Since home rule appears to have never been argued to the Court in this context it should be addressed here.

C. Drainage District Immunity Has Never Confronted a Competing Public Health Concern

Drainage Districts denigrate the significance of the public health concerns set forth in the Complaint. (Br. at 25-26).[6] They say public health is protected by DMWW's obligation under the Safe Drinking Water Act ("SDWA"), 42 U.S.C. §§ 300f et seq. (2015). (Br. at 41). Drainage Districts ignore the threat nitrate concentrations greater than 10 mg/L in the Raccoon River pose to DMWW's compliance with the SDWA. They also ignore

[6] Drainage Districts claim food production is the sole public health concern. (Br. at 26 n.4). This is not the case for the reasons explained in this section. Moreover, immunity is not necessary to promote drainage and food production. (DMWW Br. at 39-41, 55-56).

public health concerns alleged in the Complaint, (App. 3 ¶¶ 6-7, App. 14 ¶ 69, App. 16 ¶ 86, App. 17-18 ¶¶ 92-101), explained in the District Court's Order, (App. 298-300), and patent from this case's nature.

Drainage Districts misconstrue the connection of public health to the immunity issue. (Br. at 25-27). Drainage Districts assert the statutory grant of jurisdiction to create drainage districts provides that public health is just one of three grounds for establishing a district. (Br. at 25-26). This argument overlooks the interaction of Iowa Code § 468.1 with Iowa Code § 468.2. Iowa Code § 468.1 authorizes the creation of districts "whenever the same will be of public utility *or* conducive to the public health, convenience *or* welfare." (emphasis added).[7] Iowa Code § 468.2 provides a presumption that drainage is "conducive to the public health, convenience *and* welfare." (emphasis added).

Section 468.1 sets forth findings that must be made in order to establish a drainage district while § 468.2 supplies a presumption of public health benefit. The connection between presumed public health and immunity has thus always been fundamental to drainage district jurisprudence. A line of four cases illustrates this point.

[7] DMWW does not challenge the formation or existence of any drainage district.

The first is Sisson v. Bd. of Sup'rs of Buena Vista Cnty., 104 N.W. 454 (Iowa 1905). Sisson upheld the constitutionality of a board of supervisors' formation of a drainage district as a proper exercise of legislative authority delegated to the board under "An act to promote the *public health, convenience and welfare* by leveeing, ditching and draining the lands . . . ." Id. at 455 (emphasis added). Sisson saw as axiomatic that "the presence of marshes and swamps is a menace to the comfort and health of community life." Id. at 460.

The second is Mason City & Ft. D.R. Co. v. Bd. of Sup'rs of Wright Cnty., 121 N.W. 39 (Iowa 1909). Mason City denied compensation for overflow injuries deemed incidental to the exercise of police powers.[8] Id. at 40.

The third is Maben v. Olson, 175 N.W. 512 (Iowa 1919) which denied relief for overflow from a new drainage district. Id. at 515. The Court's trenchant rationale was that overflow was legally proper because it was the sole reason for creating drainage districts in the first place. Id. In reaching its result the Court distinguished sewage pollution cases. Id. at 515-16.

[8] Then, as now, the police power included "everything essential to the public safety, health, and morals . . . ." Loftus v. Dep't of Ag. of Iowa, 232 N.W. 412, 415 (Iowa 1930).

The fourth is Miller v. Monona County, 294 N.W. 308 (Iowa 1940). Miller considered a nuisance claim under Iowa Code § 12396(3) (1935) (predecessor to Iowa Code § 657.2(3) (2015)). Miller, 294 N.W. at 310. The statute dealt with "obstructing or impeding without legal authority the passage of any navigable river, harbor, or collection of water." Iowa Code §12396(3) (1935). Similarly to Maben, Miller found overflow was the intended consequence of drainage, so the district's overflow could not be a nuisance. Miller, 294 N.W. at 311. Significantly, the Court did not invoke Iowa Code § 12396(4) (1935) (now codified as § 657.2(4) (2015)) that classifies pollution as a nuisance.

Viewed together these cases show public health was a rationale supporting formation of drainage districts. These cases also show that exercise of the police power has always been a basis for denying overflow damages, because altering water flow was drainage's intended consequence. However, the early drainage cases never considered pollution claims against a drainage district. Maben, 175 N.W. at 515, and Vogt, 98 N.W. at 783, give reason to believe that if the early courts understood drainage caused pollution they would not have spoken of immunity in absolute terms. (DMWW Br. at 35).

A claim involving public health caused by pollution should be viewed

differently than claims involving overflow, and pollution claims can be recognized without disturbing any prior precedent.

III. CERTIFIED QUESTION 2: THE COURT HAS REACHED THE MERITS OF CASES INVOLVING EQUITABLE RELIEF OTHER THAN MANDAMUS

Drainage Districts' arguments on Certified Question 2 misapprehend the issue presented by asserting mandamus is equitable relief. (Br. at 35-39). DMWW does not question mandamus is a form of equitable relief, but rather argues other forms of equitable relief are also available. (DMWW Br. at 58-61).

There are drainage district cases where mandamus was found to be the proper, adequate, and exclusive remedy. Chicago Cent. & Pacific R. Co. v. Calhoun Cnty. Bd. of Sup'rs, 816 N.W.2d 367, 374 (Iowa 2012). However, it has never been the rule that mandamus is the only equitable relief available against drainage districts. Reed v. Muscatine-Louisa Drainage Dist. No. 13, 263 N.W.2d 548, 550 (Iowa 1978). Fisher recognized Reed and other cases where equitable relief, including mandamus, was granted before distinguishing claims for money damages:

> Suits have been allowed only to compel, complete, or correct the performance of a duty or the exercise of a power by those acting on behalf of a drainage district.

Fisher, 369 N.W.2d at 429. Fisher did not say, as Drainage Districts do, (Br.

at 35-37), that suits have been allowed only in mandamus because that is not the law. Drainage Districts citation to, and reliance on Iowa Code Chapter 661 and other authority governing mandamus actions is therefore misplaced. (Br. at 35-38).

If Drainage Districts' arguments show anything it is that the remedy of mandamus does not fit the case presented here. These circumstances do not exclude other remedies that are a better fit. The issue is whether an equitable remedy is available against a drainage district for the claims of the Complaint. (App. 296). Fisher's rule that allows suits to "correct . . . the exercise of a power" permits a remedy in this case. Fisher, 369 N.W.2d at 429. Once it is understood that drainage districts' power to drain also causes public health harm through pollution, then drainage districts must also be understood to have the power to remedy that harm because drainage districts can only be operated in the interest of public health, welfare, and convenience pursuant to Iowa Code § 468.2.

DMWW requests the Court respond to Certified Question 2 by holding DMWW can obtain equitable relief in addition to mandamus.

IV. CERTIFIED QUESTION 3: NO IOWA CONSTITUTIONAL RULE BARS DMWW FROM ASSERTING CONSTITUTIONAL RIGHTS AND CLAIMS AGAINST DRAINAGE DISTRICTS

Drainage Districts do not respond to the substance of DMWW's

constitutional arguments. Drainage Districts assert constitutional issues are irrelevant because of their special status. (Br. at 43-56). Drainage Districts overstate their case because the Iowa Constitution cannot be disregarded as DMWW argued in its principal brief and to the District Court. [9]

A. Drainage Districts Do Not Respond to DMWW's Assertion of Constitutional Rights

Drainage Districts do not substantively respond to DMWW's assertion of the Due Process, Equal Protection, and Inalienable Rights Clauses, and instead claim Gard is fully dispositive. (Br. at 23, 32, 40-41).

The absence of any substantive response to DMWW's constitutional arguments, other than Gard, is telling. Gard did not apply strict scrutiny to immunity from takings claims, substantive or procedural due process, or inalienable rights. Gard, 521 N.W.2d 696. Gard also did not involve all of the equal protection issues presented here. Id.

Contrary to Drainage Districts assertion, (Br. at 42), strict scrutiny is necessary if immunity otherwise bars DMWW's takings claims. Varnum v. Brien, 763 N.W.2d 862, 880 (Iowa 2009) ("classifications. . . affecting fundamental rights are evaluated according to . . . 'strict scrutiny'").

[9] Drainage Districts argued in the District Court that DMWW neither had nor could assert constitutional rights. (App. 117-119). They seem to have conceded here that DMWW has some constitutional rights, but say DMWW cannot sustain them against drainage districts. See (Br. at 40).

Drainage Districts do not explain how immunity is necessary to achieve any identifiable compelling government interest. DMWW's citations to other jurisdictions, (DMWW Br. at 39-40), shows immunity is *unnecessary* for effective drainage. Drainage Districts offer no response.

The same is true of rational basis review. Drainage Districts rely on Gard instead of Racing Ass'n of Cent. Iowa v. Fitzgerald, 675 N.W.2d 1, 11 (Iowa 2004). (Br. at 42 n.10). While Gard involved an important right—the right to safety—Gard did not involve the health concerns of 500,000 drinking water customers. Drainage Districts should have at least explained how immunity from pollution is rationally related to a legitimate government purpose. While it may be a legitimate purpose to encourage reclamation of farmland, it is irrational to absolve drainage infrastructure from all responsibility for its pollution.

B. The Iowa Constitution Does Not Shield Drainage Districts from the Consequences of Their Pollution

Rather than substantively responding to DMWW's constitutional analysis, Drainage Districts claim the Iowa Constitution shields them from responsibility for any wrong. (Br. at 43-46, 61-62). This is not the case.

1. Drainage Districts ask this Court to render provisions of the Iowa Constitution meaningless.

Drainage Districts incorrectly assert Iowa Constitution Art. I, § 18

does not require just compensation for pollution. (Br. at 61-62).

If Drainage Districts are correct, then there is a conflict between the Iowa and United States Constitutions. The United States Constitution requires compensation for downstream effects. Arkansas Game & Fish Comm'n v. United States, --- U.S. ---, 133 S. Ct. 511, 518, 184 L. Ed. 2d 417 (2012) (citing Pumpelly v. Green Bay Co., 80 U.S. 166, 20 L. Ed. 557 (1872)). Pumpelly explained "where real estate is actually invaded by superinduced additions of water, earth, sand, *or other material* . . . so as to effectually destroy or impair its usefulness, it is a taking, within the meaning of the Constitution." Arkansas Game & Fish, 133 S. Ct. at 518 (quoting Pumpelly, 80 U.S. at 181) (emphasis added). The United States Constitution requires compensation for takings regardless of the Iowa Constitution. State v. Cline, 617 N.W.2d 277, 284-85 (Iowa 2000) ("[T]his court cannot interpret the Iowa Constitution to provide *less* protection than that provided by the United States Constitution . . . .") (emphasis in original), overruled on other grounds by State v. Turner, 630 N.W.2d 601, 606 n. 2 (Iowa 2001).

Drainage Districts' argument would invalidate Iowa Const. Art. 1, § 18. This poses a question; does Iowa Const. Art. 1, § 18 ever require compensation for drainage district takings? See State v. Short, 851 N.W.2d 474, 513 (Iowa 2014) ("[W]e strive to be consistent with federal

constitutional law in our interpretation of the Iowa Constitution . . . .") (quoting Cline, 617 N.W.2d at 293).

An alternative, and better course, is to read Iowa's law in harmony with federal law. Article I, § 18 states in relevant part:

> Private property shall not be taken for public use without just compensation first being made . . . .
>
> The general assembly, however, may pass laws permitting the owners of lands to construct drains, ditches, and levees . . . and provide for the organization of drainage districts . . . . The general assembly may provide by law for the condemnation of such real estate as shall be necessary for the construction and maintenance of such drains, ditches and levees, and prescribe the method of making such condemnation.

Iowa Const. Art. I, § 18.

Article I, § 18 contemplates compensation for property taken for drainage infrastructure. Iowa Code Ch. 468 provides mechanisms for payment of compensation, and limits on such claims. Iowa Code §§ 468.26, .83-.96 (2015). However, no provision addresses pollution.

This drainage system is designed to sort out local water flow issues during district formation. This Court has upheld this rule because of the inherent nature of drainage, and compensation as provided in Chapter 468. Maben, 175 N.W. at 515-16. This framework does not even contemplate pollution. The lack of specific guidance means pollution takings must be governed by general application of Art. I, § 18.

The argument that the word "however" in Art. I, § 18 exempts drainage districts from all just compensation obligations, (Br. at 61-62), cannot withstand analysis in this context. The drainage amendment to Art. I, § 18 was passed to assure constitutionality of drainage district formation. The word "however" is readily understood as validating the formation of drainage districts notwithstanding Art. I, § 18's general protection of property from takings. The word "however" makes it clear drainage districts have a right to exist, rather than granting a total exemption from restraints on taking. This understanding is confirmed by the remainder of Art. I, § 18 authorizing statutes for condemnation such as those in Chapter 468. This interpretation has the virtue of creating harmony between the Iowa and United States Constitutions.

Drainage Districts' reliance on Maben and Miller is misplaced because Maben and Miller distinguished overflow from pollution. Maben, 175 N.W. at 515-16; Miller, 294 N.W. at 310-11. Drainage Districts quote Miller's statement that "[n]o constitutional question is here involved. . . . ", (Br. at 44) (quoting 294 N.W. at 311), to claim drainage district immunity is constitutional. A better reading of Miller is no constitutional question was argued. See 294 N.W. at 309-11.

If Maben and Miller are used to create immunity from pollution

claims, the effort faces the constitutional obstacle of Gacke v. Pork Xtra. Gacke undermines Maben and Miller because it recognizes constraints on an otherwise valid exercise of police power. Gacke, 684 N.W.2d at 178-79. This is enough to raise questions about extension of immunity to this case.

Drainage Districts argue none of DMWW's property at issue is "private property" for constitutional purposes, and Gacke does not apply because DMWW is not a private party. (Br. at 45 n.12, 57-61). This is incorrect because there is no distinction between private and public entities for takings purposes. U.S. v. 50 Acres of Land, 469 U.S. 24, 31, 105 S. Ct. 451, 455-56, 83 L. Ed. 2d 376 (1984); State ex rel. Bd. of R.R. Com'rs of State of Iowa v. Stanolind Pipe Line Co., 249 N.W. 366, 369 (Iowa 1933).

2. The Iowa Constitution permits political subdivisions to seek redress from other political subdivisions including drainage districts.

Drainage Districts also claim DMWW cannot assert its constitutional rights. (Br. at 40-53). This is incorrect as a matter of Iowa law for the following reasons.

a. DMWW does not challenge state sovereignty, the constitutionality of any statute, or the right of any drainage district to exist.

Drainage Districts wrongly assert DMWW improperly challenges state sovereignty. (Br. at 43-52). They also incorrectly claim DMWW

challenges the constitutionality of Chapter 468 and drainage district formation. (Br. at 47).

Drainage Districts cite Charles Hewitt & Sons Co. v. Keller, 275 N.W. 94 (Iowa 1937) and similar cases to say DMWW cannot challenge the constitutionality of a statute or the authority of its creator. (Br. at 47-49). These authorities do not apply to DMWW as a municipal utility. (DMWW Br. at 61-69). Further, DMWW neither challenges the authority of the state nor the validity of any statute. Immunity is not in any statute. Permitting DMWW's claims as stated in the Complaint would not affect the constitutionality of Chapter 468. DMWW only challenges the pollution impact of the Drainage Districts' operations.

b. The legislature has not apportioned rights between DMWW and Drainage Districts.

Drainage Districts argue the legislature has apportioned rights between DMWW and drainage districts, and there can be no challenge, constitutional or otherwise, to the legislative decision. (Br. at 26, 34, 42-43, 45 n.12, 46, 58). However, there has been no such apportionment.

Drainage Districts assert DMWW is attempting to disturb apportionment of state assets. (Br. at 26, 43-49). What, however, are the state assets? Waters of the state are a public asset. Iowa Code § 455B.171(39). However, DMWW has been granted permits for their use.

(App. 14 ¶ 73). If a "right to pollute" is the asset in question, Drainage Districts have no express authorization for that. If there is actually some binding allocation of rights at work here, where is it expressed? No specific statute has been cited on this point because there is none.

In particular Drainage Districts cannot cite any Iowa authority reflecting the legislative decision that DMWW should be responsible for purifying the state's water. Instead, Drainage Districts cite the SDWA and assert drinking water will be clean. (Br. at 41). The SDWA does require safe drinking water, but it does not represent the legislature's judgment that DMWW is solely responsible for clean water.

In fact, there is good reason to believe the legislature and Court never made such a judgment. Maben strongly suggests neither the Court nor the legislature ever appreciated that drainage districts pollute. See Maben, 175 N.W. at 515.

c. Federal law respecting state sovereignty does not restrict this Court's application of the Iowa Constitution.

Drainage Districts rely on federal cases to dismiss DMWW's Iowa constitutional claims. In these cases, federal courts decline to intervene in disputes between political subdivisions and their states. (Br. at 46-47, 51-52). Drainage Districts' federal authorities rely upon analysis exemplified by

City of Trenton v. State of New Jersey, 262 U.S. 182, 43 S. Ct. 534, 67 L. Ed. 937 (1923) and Hunter v. City of Pittsburgh, 207 U.S. 161, 28 S. Ct. 40, 52 L. Ed. 151 (1907). (Br. at 42, 46, 50-51, 54-55). Hunter and its progeny address whether political subdivisions may assert federal constitutional rights against their states. Hunter, 207 U.S. at 178-79. Hunter stands for the primacy of state constitutions in determining the rights and authorities of political subdivisions. Id.

There is no basis for using a federal doctrine,[10] created to respect state law, to limit rights and remedies under the Iowa Constitution. The caution federal courts have about intervening in state matters is inapplicable when this Court decides Iowa constitutional issues. Even if the Court discovered an Iowa analogue to Hunter there is no reason to extend it to suits between political subdivisions. The core of Hunter is a limitation on federal court intervention in state matters. Hunter, 207 U.S. at 178-79. The concerns about mischief that might arise from federal intervention are inapplicable to suits between subdivisions involving state constitutional matters.

[10] There is good reason to believe Hunter and its progeny in the courts of appeals are no longer valid. See Kathleen S. Morris, The Case for Local Constitutional Enforcement, 47 Harv. C.R.-C.L. L. Rev. 1 (2012); see also City of Hugo v. Nichols, 656 F.3d 1251, 1267 (5th Cir. 2011) (Matheson, J. dissenting) (recognizing the "modern trend to limit the scope of the political subdivision standing doctrine.").

C. This Case Is Not a Non-Justiciable Political Question

The Drainage District Association as amicus argues examination of the validity and applicability of drainage district immunity is a non-justiciable "political question." (Amicus at 18) (citing Des Moines Register & Tribune Co. v. Dwyer, 542 N.W.2d 491, 495-96 (Iowa 1996)). This is a misapplication of that doctrine. There is a difference between a question of political interest and a "political question." Alperin v. Vatican Bank, 410 F.3d 532, 548 (9th Cir. 2005) ("Simply because . . . the case arises out of a "politically charged" context does not transform the Property Claims into political questions.").

There is no "political question" here as there was in Des Moines Register, which involved an effort to obtain judicial review of a Senate Rule. 542 N.W.2d at 497. This case does not invade prerogatives of a separate branch of government to govern itself, and involves neither the clash of separate powers nor the potential embarrassment of intrusion into the affairs of a coequal branch. It is a matter within the heart of the judicial function.

D. DMWW Can Assert a Takings Claim By Means Other Than Mandamus

Drainage Districts attempt to expand the scope of the Certified Questions by challenging the procedure DMWW used to assert its takings claim. (Br. at 62). This argument is incorrect because mandamus is not the

only means of enforcing the Takings Clause, and because Drainage Districts ignore DMWW's assertion of the Takings Clause to invalidate drainage district immunity.

Iowa Courts recognize "inverse condemnation" is "a generic description of the manner in which a landowner recovers just compensation for a taking of his property. . . ." Scott v. City of Sioux City, 432 N.W.2d 144, 145 n.1 (Iowa 1988).

There are Iowa cases where litigants have sought relief for uncompensated takings without mandamus. See, e.g., K & W Elec., Inc. v. State, 712 N.W.2d 107, 112 (Iowa 2006) (damages); Molo Oil Co. v. The City of Dubuque, 692 N.W.2d 686, 692 (Iowa 2005) (certiorari, declaratory, and injunctive relief); Iowa Mining Co. v. Monroe Cnty., 555 N.W.2d 418, 426 (Iowa 1996) ("Iowa Coal II") (declaratory relief); Iowa Coal Mining Co. v. Monroe Cnty., 494 N.W.2d 664, 667 (Iowa 1993) ("Iowa Coal I") (certiorari and declaratory relief). Even if mandamus was the only mechanism for asserting a taking, the issue is one of form rather than substance and is not before the Court. DMWW properly pled its request for relief. See Molo Oil, 692 N.W.2d at 692 (a claim for inverse condemnation was pled by alleging "the adoption of the ordinance constitutes an improper condemnation or taking of the [landowners'] property . . . ."). The District

Court can select the proper remedy.

Regardless, the Takings Clause can also invalidate application of drainage district immunity. Iowa cases recognize serious constitutional questions arise from immunity that denies just compensation for a taking. Gacke, 684 N.W.2d at 174; Bormann v. Bd. of Sup'rs in and for Kossuth Cty., 584 N.W.2d 309, 319-20 (Iowa 1998); Dalarna Farms v. Access Energy Coop., 792 N.W.2d 656, 663-64 (Iowa 2010).

DMWW requests the Court respond to the District Court on Certified Question 3 by recognizing that the Iowa Constitution does not immunize drainage districts from all pollution claims, but instead mandates compensation.

V. CERTIFIED QUESTION 4: THE DRAINAGE DISTRICTS MISSTATE DMWW'S PROPERTY RIGHTS

Drainage Districts continue to misstate DMWW's property rights at issue. (Br. at 57). DMWW does not claim ownership of the Raccoon River. All agree the Raccoon River is a water of the state. Iowa Code § 455B.171(39). However, Iowa Code Ch. 455B does not displace DMWW's common law riparian rights. Freeman v. Grain Processing Corp., 848 N.W.2d 58, 89 (Iowa 2014) (Iowa Code Ch. 455B did not preempt Iowa common law). Moreover, DMWW unquestionably owns real estate and facilities injured by pollution. (App. 14-15 ¶¶ 72, 74-78).

Drainage Districts also incorrectly assert pollution by a political subdivision cannot be a taking. (Br. at 58-59). Drainage Districts' authority is inapplicable to DMWW's claims as alleged in the Complaint. See, e.g., United States v. Cherokee Nation of Oklahoma, 480 U.S. 700, 705, 107 S. Ct. 1487, 1490, 94 L. Ed. 2d 704 (1987) (addressing the United States' right to modify river for navigation, not pollution); United States v. 30.54 Acres of Land, 90 F.3d 790, 795 (3d Cir. 1996) (same); Borough of Ford City v. United States, 345 F.2d 645, 647 (3d Cir. 1965) (same); Ancarrow v. City of Richmond, 600 F.2d 443, 446 (4th Cir. 1979) (whether pollution was a taking under Virginia common law); In re Tennessee Valley Auth. Ash Spill Litigation, 805 F. Supp. 2d 468, 493 (E.D. Tenn. 2011) (plaintiffs were not riparian owners); but see St. Bernard Parish Gov. v. United States, 121 Fed. Cl. 687, 746 (2015) (United States is liable for flooding).

Drainage Districts' Iowa authority is similarly inapplicable because DMWW does not challenge the authority of the state to make adjustments for navigation. See Peck v. Alfred Olsen Const. Co., 245 N.W. 131, 134 (Iowa 1932).

DMWW is not seeking compensation arising from actions of the State of Iowa or the United States, but rather from Drainage Districts arising from their invasion of DMWW's properties by pollution.

CONCLUSION

For the reasons set forth above, DMWW respectfully requests the Court recognize DMWW's right to obtain redress from Drainage Districts.

REQUEST FOR ORAL ARGUMENT

Board of Water Works Trustees for the City of Des Moines, Iowa respectfully requests to be heard at oral argument prior to submission.

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) because this brief contains 6,974 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

2. This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because this brief has been prepared in a proportionally spaced typeface using Times New Roman font and utilizing the 2010 edition of Microsoft Word in 14 point font plain style.

/s/ John E. Lande
Signature

March 25, 2016
Date

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on the 25th day of March, 2016, I electronically filed the foregoing document with the Clerk of the Supreme Court by using the Iowa Judicial Branch electronic filing system which will send a notice of electronic filing to the following:

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